78-1800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

JEROME H. LOUCHHEIM, III, *Petitioner,*

v.

THE STATE OF NORTH CAROLINA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina, rendered January 4, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 296 N.C. 314, 250 S.E.2d 630 (1979) and is set forth in the Appendix. The opinion of the North Carolina Court of Appeals is reported at 36 N.C. App. 271, 244 S.E.2d 195 (1978) and is set forth in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1970), the petitioner having asserted below

and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of North Carolina was entered on January 4, 1979, and this petition is filed within the period authorized by order of this Court dated March 22, 1979, Application No. A-822.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Under the Fourth Amendment, is there probable cause for the issuance of a warrant to search the premises of an ongoing business to find incriminating business papers where the affidavit in support of the application states that the papers which are the object of the search were last seen on the premises fourteen months before, and further that the State authorities had been conducting an intensive investigation on the business premises with respect to the transactions covered by these papers for more than the past two weeks?

2. Is there a presumption that incriminating business papers are permanently retained in the files of a business and are never removed by the owner or destroyed, because the records of the business might be audited at some time in the future?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Much of the history of this proceeding will be found in the opinion of the Supreme Court of North Carolina attached. (App. p. 25 *et seq.*)

With respect to this Petition, and the Fourth Amendment question presented, the following are the relevant facts.

Petitioner was the president and principal stockholder of Capital Communications, Inc., which later changed its corporate name to Louchheim, Eng and People (hereinafter "C.C.I."). (App. 26, 30)

C.C.I. entered into a one-year contract with the State of North Carolina for the period July 1, 1973 to June 30, 1974 (App. 26; R. 53) to handle the advertising of the State for industrial development. C.C.I. was to receive the customary 15% commission on advertising placed, plus reimbursement for actual production expenses of necessary art, layout and copy work purchased by C.C.I. from outside sources.

A second one-year contract was made for the period July 1, 1974 to June 30, 1975 and a third one-year contract was made for the period July 1, 1975 to June 30, 1976. (App. 26)

The volume of business under the contracts averaged between $350,000 and $500,000 a year, or over one million dollars for the total three year period. (R. 53, 116)

Petitioner was indicted on eight separate charges of feloniously obtaining property from the State by false pretense and on one charge of conspiracy to commit felonious false pretense. (App. 25-6; R. 1-14)

The alleged crime was of primitive simplicity. C.C.I. from time to time purchased art, layout and copy work from a Florida firm called Ad Com International (hereinafter "Ad Com"). It was alleged that, when Ad Com rendered bills for this material, Petitioner, as president

of C.C.I., directed the preparation of falsely "written up" bills to the State in larger amounts, for reimbursement under the contracts, which bills were paid by the State. Further, Petitioner directed an employee of Ad Com to prepare new Ad Com bills to match the "written up" bills which had been rendered to the State. (App. 28)

The eight false pretense indictments were each dated 28 June, 1976, each based upon a specific different overcharge of the State on an Ad Com billing. The court non-suited the State on one indictment and the jury found Petitioner innocent on three indictments. (App. 29-31) No further discussion of these is relevant here.

The jury found Petitioner guilty on four false pretense indictments, as follows:—

(1) A "write up" of $374.78 on a bill to the State of $38,254.98 on 22 August, 1973, paid by the State on 30 August, 1973. (R. 158-9)

(2) A "write up" of $628.12 on a bill to the State of $11,198.68 on 10 October, 1973, paid by the State on 16 October, 1973. (R. 160-1)

(3) A "write up" of $239.00 on a bill to the State of $24,972.94 on 4 December, 1973, paid by the State on 19 December, 1973. (R. 161-2)

(4) A "write up" of $370.00 on a bill to the State of $23,410.45 on 11 January, 1974, paid by the State on 17 January, 1974. (R. 163)

The jury also found Petitioner guilty on an indictment dated 28 June, 1976, for conspiracy, as having conspired with the president of Ad Com to accomplish the "write up" of the bills. (R. 2, 153-7)

All of the transactions covered by the four false pretense indictments related to the first contract, which covered the period July 1, 1973 to June 30, 1974.

The Supreme Court of North Carolina held that the State's evidence, which satisfied the burden of proof to convict the Petitioner on the four false pretense counts and the conspiracy count, was a document identified as State Exhibit 24 which provided circumstantial evidence "from which a jury could reasonably infer that false representations were made." (App. 42-3)

That document was obtained by the State solely as the result of a search of the offices of C.C.I. pursuant to the search warrant issued 25 May, 1976. (R. 72)

The facts relating to the search warrant are as follows:

In December of 1974 and January, 1975, some six months after the termination of the first contract on June 1974, the State Auditor of North Carolina conducted an audit of C.C.I. (R. 64-6) This audit covered the entire period of the first contract, 1973/4 and the first six months of the 1974/5 contract. Because of what the auditors described as "atrocious" bookkeeping and "regular confusion" on the part of both the State and C.C.I. (R. 55), a series of adjustments were made for overbillings and underbillings. These resulted in a net debt of C.C.I. to the State of $10,907, (App. 27; R. 69) which was duly paid by C.C.I. to the State. Of this amount, $1,135 related to the Ad-Com account. (R. 70)

The bulk of the mistakes represented a difference between an estimated insertion rate with the media which turned out to be actually different when the

advertising ran. This resulted in "an undercharge or overcharge to the State". (R. 66-7)

Nothing further happened with respect to the completed 1973/4 contract for a period of more than a year.

In February, 1976, a second audit was made by the State which covered the whole of the 1973/4 contract, the whole of the 1974/5 contract and the first six months of the 1975/6 contract. (R. 66, 70) The total amount of adjustment was $2,916.00, which C.C.I. repaid to the State. (R. 71) The audit result contained no allocation of the $2,916.00 as between the three different contracts.

On 25 May, 1976, almost two years after the termination of the 1973/4 contract, a special agent of the State Bureau of Investigation filed an application for a search warrant for the books and records located in the offices of C.C.I., accompanied by his affidavit in support, which averred:

> (1) a contract had been made between C.C.I. and the State dated July 1, 1973;
>
> (2) the affiant had interviewed a "confidential informant" on 28 April, 1976 and 3 May 1976, later identified as Ms. Toni Brennan, a former employee of Ad Com and subsequently of C.C.I.;
>
> (3) the confidential informant advised him that C.C.I. "maintained two different sets of invoices" respecting Ad Com production costs, namely, the "true" Ad Com bills, and the "untrue and inflated" bills which had been submitted to the State;
>
> (4) these bills antedated March, 1975, which was the last date they had been seen by the confidential informant;

> (5) following these interviews with the confidential informant, Petitioner on 7 May, 1976 agreed to allow State investigators to examine C.C.I.'s records, including records and invoices of the 1973 contract. (The affiant did not state that the records of the 1973 contract had already been audited twice by the State in January, 1975 and in February, 1976);
>
> (6) Petitioner on 13 May, 1976 delivered to the affiant the original Ad Com bills and copies of the C.C.I. bills to the State for the 1973/4 period to permit examination and expert opinion as to the identity of the typewriter on which they had been prepared. (R. 20-6)

The affidavit also asserted that a Mrs. Justice, a former employee of C.C.I., had seen "approximately two weeks ago . . . two sets of incompatible and different invoices from Ad Com" in C.C.I.'s offices. This statement was admittedly false as to both parts and the State so conceded. (R. 28-9, 32, 36, 38-9). The North Carolina Supreme Court, under the rule of *Franks* v. *Delaware,* 438 U.S. 154 (1978), disregarded this false material in this affidavit. (App.) This issue has no relevance to the present Petition.

On the basis of this affidavit the magistrate found:

> "that there is probable cause to believe that the property described in the application on the reverse hereof and related to the commission of a crime is located as described in the application,"

and issued a search warrant on 25 May, 1976. (R. 19)

The magistrate did not confine the search warrant to the duplicate sets of invoices as described by Ms.

Toni Brennan in the affidavit but authorized an all-embracing search of:

> "corporate minutes, bank statements and checks, sales invoices and journals, invoices, and other books and documents kept in the course of business by Louchheim . . . . and Capital Communications, Incorporated, of North Carolina during all periods . . . [they] were under contract to perform any advertising service for the State of North Carolina. . ." (R. 20)

The State agents and the district attorney then conducted a six-hour search of Petitioner's office that same day (R. 37) during which a large volume of documents was seized, including personal files and records of Petitioner and his wife which had nothing to do with the C.C.I. contracts. The seizure was so all-inclusive as to require the virtual closing of the business. (R. 17)

Petitioner moved on 16 June, 1976, to quash the search warrant and to suppress and secure the return of the seized items on the grounds, *inter alia*, that the warrant was issued without probable cause and that the affidavit was defective and untruthful. (R. 15-19) On 15 July, 1976, a hearing was held on this motion. The State stipulated that the search warrant was issued "only on the basis of the affidavit attached to it and no other information." (R. 31)

With respect to the averments in the affidavit relating to Mrs. Justice, the State's witnesses conceded that the statements attributed to her respecting "incompatible" invoices were "an embellishment" of her statements and that there was "no attempt to quote her". Further, the State's witnesses confirmed that she had given no date on which she had last seen the invoices. She testified that she had "no idea" whether the in-

voices were different or identical and that she had last seen them in January, 1974, more than two years before the date of the affidavit. (R. 28-9, 32, 36, 38-9)

The trial court denied Petitioner's motions, ruling that the search and seizure were not unreasonable or in violation of the Fourth Amendment because "the search warrant was based on an affidavit which was sufficient to support the magistrate's finding of probable cause." (R. 39-40)

In the manifold documents seized in the all-embracing search, there was not a single set of double Ad Com invoices, one "true" and one "untrue and inflated", as described by Ms. Toni Brennan in the affidavit for the search warrant. None were offered in evidence by the State at the trial.

On the other hand, a single ledger sheet was found (State Exhibit 24) which gave the State circumstantial evidence to support a charge of "overbilling" the State on the Ad Com invoices. (R. 72; App. 42-3)

This document was not a ledger sheet of C.C.I. but was a ledger sheet of Ad Com, prepared by Toni Brennan when she was working for Ad Com. She stated that it contained a record of the amount of Ad Com's billings to C.C.I. which she entered in the debit column when she typed up the bills as an Ad Com employee. The amounts in the credit column indicate checks received from C.C.I. (R. 81)

No explanation was offered by Ms. Brennan of the presence of this Ad Com ledger sheet in C.C.I.'s office. She said that it "appears to have come over the facsimile machine." (R. 81)

The trial lasted for ten days. The State relied heavily on Exhibit 24, which was admitted over objection of the Petitioner. (R. 88)

The State's witness, Wheeler, who testified as an expert accountant and auditor, relied exclusively on Exhibit 24 as evidence of overcharges on the false pretense counts on which Petitioner was convicted. (R. 92-3)

The court, in its charge to the jury, included a specific reference to Exhibit 24 in each separate analysis of each false pretense count on which Petitioner was convicted. (R. 158, 160, 161, 162)

On the three false pretense counts, not covered in Exhibit 24, Petitioner was acquitted by the jury. (R. 164, 165, 166, 171, 175)

The jury found the Petitioner guilty on four false pretense counts, totalling $1,611.90 and on the conspiracy count. (R. 175) The court sentenced Petitioner to four years on the conspiracy count and suspended a five-year sentence on the four false pretense counts. (R. 172)

Judgment was affirmed by the North Carolina Court of Appeals (App. 45-60) and by the Supreme Court of North Carolina. (App. 25-44)

The Supreme Court of North Carolina relied exclusively on State Exhibit 24 as the basis for its conclusion that "there was sufficient evidence from which a jury could reasonably infer that false representations were made." (App. 42-3)

If, as Petitioner contends, the search warrant was invalid under the Fourth Amendment, State Exhibit 24 was inadmissible; and without it, no sufficient evidence was offered by the State to support the conviction of Petitioner.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On June 16, 1976, Petitioner filed a written, pretrial "Motion to Quash Search Warrant and for Return of Seized Property" (R. 15-9), which alleged, *inter alia,* that the May 25, 1976 search of petitioner's office was violative of the Fourth Amendment because the search warrant "was issued without probable cause". A hearing on this motion was held July 15, 1976, and the trial court thereafter denied the Motion orally (R. 39-41), ruling that "the search warrant was based on an affidavit which was sufficient to support the magistrate's finding of probable cause in that the affidavit specified necessary circumstances adequate to support a finding that a crime had been committed; that evidence of such crime was in the possession of the parties and the premises to be searched and of the basis for believing reliability [sic] the information supplied by the confidential informant" (R. 39-40); that "the affidavit was truthful . . . in that it reported in good faith, although exaggerated, the circumstances relied upon to establish probable cause" (R. 40); that "the scope of the search and the extent of the items seized were authorized by the warrant and reasonably necessary in order to discover the items in the warrant specified," *ibid.*; and that "the warrant sufficiently specified the items to be seized," *ibid.* The trial court entered a substantially similar written order on August 12, 1976. (R. 41-3)

Petitioner objected at the trial to the introduction by the State of any documents obtained by the State as the result of the search, and particularly of State Exhibit 24. (R. 72)

On appeal, Petitioner's first Assignment of Error was that "[t]he Court committed prejudicial error in denying defendant's motion to prohibit the introduction at trial of items seized in the search of May 25, 1976, at the premises of Louchheim, Eng and People". (R. 182) Petitioner briefed this as a Fourth Amendment contention because, *inter alia,* the information of the informant was fourteen months old (Brief of Defendant Appellant at 9-31, *State* v. *Louchheim,* N.C. Ct. App. No. 7710SC909-10th Dist.) The North Carolina Court of Appeals rejected petitioner's argument, ruling that the lapse of 14 months was not excessive because "such records are usually kept for years" and relying upon *Andresen* v. *Maryland,* 427 U.S. 463 (1976). (App. 52-4)

Petitioner obtained discretionary review in the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-31, and again contended that the May 25, 1976, search was violative of his Fourth Amendment rights for want of probable cause due to the fourteen months gap. (Brief for Appellant at 3-11, *State* v. *Louchheim,* No. 7710SC909-10th Dis.) The Supreme Court of North Carolina affirmed, rejecting the Fourth Amendment claim and sustaining the search warrant in the face of the fourteen-month gap. (App. 33-6)

REASONS FOR GRANTING THE WRIT

1. This Petition raises questions of national importance, never before dealt with by this Court, respecting

the limits of searches and seizures of a person's business papers under the Fourth Amendment.

This case is unique and no case like it has been considered by this Court or by any Court of Appeals.

This case not only raises novel questions of "staleness" in connection with the affidavit for the issuance of a search warrant, but more importantly raises the question of the validity of a new doctrine of probable cause, invented by the Supreme Court of North Carolina, for the search of business papers.

2. The affidavit in support of the search warrant in this case asserted that incriminating business papers of the Petitioner had last been seen at his business office fourteen months ago.

The affidavit further stated that the North Carolina State authorities had been conducting an intensive investigation of the Petitioner and of his business, with respect to the exact transactions covered by the papers in question, for more than two weeks prior to the date of the affidavit. Petitioner had cooperated with the State authorities in the investigation and had furnished them with a substantial number of documents.

3. Neither this Court, nor any Court of Appeals, nor any District Court, has ever sustained a search warrant for business papers, based on an assertion that the object of the search was currently under intensive investigation and had last been seen on the premises to be searched fourteen months previously.

We have found four federal cases on this issue. The Court of Appeals of the District of Columbia, in April, 1963, in *Schoeneman* v. *United States,* 317 F.2d 173 (1963), set aside a search warrant for business papers where the affidavit stated that the incriminating papers

had last been seen, on the premises to be searched, 107 days prior to the application for the warrant. The opinion notes that the Government could not cite, nor could the Court find, any case which sustained such a search warrant issued after more than a thirty day gap. 317 F.2d at 177.

We have found only three federal cases, decided after April, 1963, which have dealt directly with the problem of probable cause and "staleness" with respect to a search of business papers.

United States v. *Forsythe,* 560 F.2d 1127 (3d Cir. 1977) held that a gap of "more than one month" was not excessive.

In *Andresen* v. *Maryland,* 427 U.S. 463 (1976), the prosecution asserted that the accused, a settlement attorney, had defrauded a purchaser of a lot (No. 13T) in a subdivision by representing that the lot was clear of encumbrance, when he knew there were two outstanding liens. An application for a search warrant was filed for permission to search his office, and the office of a corporation which he controlled; the warrant was limited to specified documents pertaining to the sale of the particular lot 13T.

All but a few of the documents seized were either returned or suppressed, and these few were introduced into evidence at the trial.

The bulk of the majority opinion and of the dissent of Mr. Justice Brennan was devoted to a Fifth Amendment issue not present in this case. Almost all of the discussion of the Fourth Amendment was devoted to the problem of general warrants and the application of *Warden* v. *Hayden,* 387 U.S. 294 (1967), neither of which is at issue here.

The subjects of probable cause and "staleness" were peripheral issues. The entire opinion of the Court on these subjects is a footnote 9 to Mr. Justice Blackmun's majority opinion. 427 U.S. at 478-9. Justice Brennan's dissent does not mention it. Half of this footnote is devoted to the reliability of the information in the warrants, which is not at issue here. On "staleness", there is but a single paragraph, less than half the footnote.

In *Andresen,* there was a "three month delay between the completion of the transactions on which the warrants were based, and the ensuing searches." *Ibid.* The opinion held that it was reasonable to believe that the records respecting Lot No. 13T were still in Andresen's office at the time of the search because he had secured a release on Lot No. 13T with respect to one lienholder only three weeks before the searches and another lien remained to be released. The footnote expressed no opinion on whether the three-month gap would have been sustained in the absence of the recent action within three weeks of the date of the affidavit.

On its face, this bears no resemblance to the present case, where there was a more than fourteen-month gap between the transactions on which the warrants were based and the ensuing searches, and there was no assertion in the affidavit that any new action was taken during the fourteen-month period by the Petitioner.

United States v. *Midtaune,* 589 F.2d 370 (8th Cir. 1979), (petition for certiorari filed, March 23, 1979) discussed only the sufficiency of the substantive averments of the affidavit. The opinion says nothing about the passage of time or "staleness".

4. A fundamental requirement for a valid warrant is that it be reasonable to presume that the objects, seen at some previous time on the premises, will still be there on the same date the warrant issues, and will not have been removed or destroyed. Where there is a significant time gap between the last date the objects were seen and the date of the affidavit, an explanation of the delay must be furnished to sustain the search warrant. This explanation will be founded on the nature of the property, the nature of the crime alleged, and whether it can be assumed that the property will have been removed or disposed of in the interim. *Sgro* v. *United States*, 287 U.S. 206, 210 (1932); *United States* v. *Johnson*, 461 F.2d 285, 287 (10th Cir. 1972); *United States* v. *Steeves*, 525 F.2d 33, 38 (8th Cir. 1975); *United States* v. *Brinklow*, 560 F.2d 1003, 1005 (10th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

Of particular importance is the nature of the object and whether it is "consumable" and therefore "less likely to remain in one place". *United States* v. *Steeves*, *supra*.

The objects in this case are a small handful of invoices issued by Ad Com to C.C.I. prior to March, 1975. What reasonable assurance was there that they would not have been removed or destroyed during the fourteen months between March, 1975 and May, 1976? And particularly during the two weeks the State authorities were in Petitioner's office actively investigating the Ad Com account?

The short answer is that, under the facts of this case and the content of the affidavit, there was no possibility at all that the invoices would have been in Petitioner's business files on May 25, 1976. (This was, of course,

confirmed by the fact that no such invoices were found in the massive search.)

If ordinary "commonsense," *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965), and "the factual and practical considerations of everyday life," *Brinegar* v. *United States,* 338 U.S. 160, 175 (1949), are the touchstones in probable cause cases, how can it be reasonably probable that Petitioner would carefully keep the incriminating "true" invoices in his office files, so that they would be there when the contractual audit took place? *A fortiori,* if they had been kept for some strange reason until April, 1976, would they still be kept after the State began an intensive investigation in Petitioner's office of the C.C.I.-Ad Com relationships in early May, 1976, some two weeks before the date of the affidavit?

The inevitable "commonsense" probability can only be that the "true" invoices, if they ever existed, would have disappeared from Petitioner's files long before April, 1976, and most certainly in early May, 1976, when the State's auditors and investigators descended on Petitioner's office.

5. How then did the Supreme Court of North Carolina sustain the validity of the warrant and the search? It did so by:—

> (a) directly violating the basic principle that probable cause must be based on the affidavit presented to the magistrate and may not be based, by hindsight, on what later develops at the trial. *Sgro, supra; Schoeneman, supra; Durham* v. *United States,* 403 F.2d 190 (9th Cir. 1968); *United States* v. *Harris,* 412 F.2d 796 (6th Cir. 1969) *rev'd on other grounds,* 403 U.S. 573 (1971);

United States v. *Rahn*, 511 F.2d 290 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975).

(b) inventing a new and dangerous doctrine of probable cause with respect to business papers which presents disastrous consequences to America's businesses, large and small, and substantially annuls the Fourth Amendment with respect to business papers.

It is this new doctrine and its consequences which are the main thrust of this Petition.

Four reasons were advanced by the Court to support its conclusion that the incriminating papers would probably still be on the premises fourteen months later:—

(a) "the alleged crime is a complex one taking place over a number of years";

(b) "the place to be searched is an ongoing business";

(c) "the invoices . . . were kept in these offices in compliance with the State advertising contract";

(d) "the items to be seized included corporate minutes, bank statements and checks, sales invoices and journals, ledgers, correspondence, contracts . . . and other books and documents kept in the course of business . . . during all periods which said corporations were under contract to perform any advertising services [for] the State of North Carolina." (App. 35)

6. The first reason is a perfect illustration of the clarity and omniscience of hindsight. There is not a word in the affidavit to support this assertion; what support it may have comes from material developed at the trial.

So far as the affidavit defines the alleged crime, far from being "complex", it was of utmost simplicity. Each offense, if there was more than one, consisted of two pieces of paper, a "true" invoice from Ad Com to C.C.I. and a fictitious "written up" invoice on Ad Com stationery submitted by C.C.I. to the State. Since the State had possession of the "written up" invoice, the only incriminating document, as to any offense, was a single piece of paper, the "true" Ad Com invoice, which had been secreted and never disclosed to the State. The crime as described in the affidavit took place over a relatively short period. The only contract referred to in the affidavit is a contract between C.C.I. and the State dated July 1, 1973. The "confidential informant" said she had typed the fictitious "written up" invoices at times not disclosed in the affidavit, and had last seen them in the office of the Petitioner in March, 1975. These could not have been typed until Ad Com had rendered substantial services some months after the contract began in July, 1973 and they were all typed sometime before March, 1975.

There is absolutely no support in the affidavit for the statement that "the alleged crime is a complex one taking place over a number of years."

7. The fourth reason is a masterpiece of illogic. The affidavit refers to specific and identifiable invoices as the evidence of the crime last seen fourteen months before in Petitioner's office.

The issue is whether there was, fourteen months later, probable cause that these invoices were still in the office and had not been destroyed or moved in the interim, particularly in the face of the ongoing investigation by the State in Petitioner's office. The North

Carolina court found there was probable cause, on the ground that the applicant sought a search warrant for a wide search of the premises (it reads like a "general warrant") to seize every kind of business paper of the Petitioner, in no way confined to the specific and identifiable invoices recited in the affidavit.

This is a classic non-sequitur. How can the breadth and scope of the requested search bear on the probability that the specific invoices identified in the affidavit will be there after fourteen months? The North Carolina court gives no hint.

8. The second and third reasons delimit the North Carolina court's new and dangerous doctrine which annuls the Fourth Amendment's protection of business papers from unreasonable searches and seizures.

The Court's reasoning creates a presumption that, if any businessman continues to run an "ongoing business" and has a contract which provides for the retention of documents for future audit, he will keep carefully in his files for an indefinite period evidence to prove that he has submitted false invoices under the contract.

This presumption operates without time limits. In this case, the invoices were presumably kept in the files in excess of fourteen months. The time could just as readily be twenty-four months or thirty-four or forty-four if there is an ongoing business and a contract to keep papers for future audit.

As pointed out above, each alleged crime consisted of two pieces of paper, a "true" invoice from Ad Com and a "written up" invoice on Ad Com stationery. The latter was submitted to the State in 1973 or 1974,

and the State always had it. The former was always secreted from the State, since if it existed, its disclosure would reveal the alleged offense.

Further, the inevitable presumption and the only reasonable probability is that the "true" invoices, under these circumstances, would never be retained in the files. They could serve no purpose to C.C.I.'s business; they could serve no purpose so far as the State contract was concerned; they could only embarrass C.C.I. if they were disclosed.

Not at all, says the North Carolina court. The fact that C.C.I. was an "ongoing business" and the existence of the contractual provision for audit of the C.C.I.-State contract are determinative. Therefore, says the court, it was reasonably probable on May 25, 1976, that Petitioner would carefully have kept the "true" invoices for the fourteen months after March, 1975 through May, 1976, including the two weeks in May of the investigation in Petitioner's office. The passage of time is immaterial.

The North Carolina court overlooked the critical fact that the "audit" argument was demolished by the State's own witnesses. Donnie Wheeler testified (R. 64-71 incl.) that the State had made a complete audit of the 1973 contract in December of 1974 and January of 1975, *sixteen months* prior to the filing of the affidavit for a search warrant. That audit developed a series of overbillings and underbillings and a final adjustment of the account in favor of the State which C.C.I. had paid in full.

If the account had been fully audited in January, 1975, how was C.C.I. obligated to continue to retain

any papers thereafter for purposes of audit? That obligation under the contract had been fully discharged.

The new doctrine of the North Carolina court holds that there will be a presumption of unlimited retention and no requirement of any reasonable time limit if (a) the business records which are the subject of the search are the records of an ongoing business, and (b) the records are subject to an audit, even though that audit has been made and the account fully adjusted.

This effectively annuls the Fourth Amendment's requirement of "reasonable" searches and seizures and the doctrine against "stale" applications for warrants, when business papers are the object of a search. No longer will it be necessary to follow the doctrine of Chief Justice Hughes in *Sgro, supra,* that the proof of probable cause "must be of facts so closely related *to the time of the issue of the warrant* as to justify a finding of probable cause at that time." 287 U.S. at 210 (emphasis supplied).

The impact of such a doctrine will be disastrous for all businesses, small and large. Unless this decision is reversed, it will only be necessary for a discharged employee to assert that, at some distant time in the past, incriminating business documents were seen in the business files. This in turn will support a wide-ranging search of the papers of the business.

Such a new rule will reverse the holdings of *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931), *See* v. *City of Seattle,* 387 U.S. 541 (1967), and *G.M. Leasing Corp.* v. *United States,* 429 U.S. 338 (1977), all of which hold that business premises and business

papers are entitled to full Fourth Amendment protection.

If the North Carolina decision remains unreversed, this Court will have put its imprimatur on a new doctrine of probable cause. With respect to the business papers of an ongoing business there will be a presumption that any incriminating papers, seen at *any* time in the businessman's office, will be retained intact by him in his office forever.

This presumption will be further butressed if the business papers are to be subject to future audit. But all businesses are subject to audit, for a period of several years, with respect to both Federal and State tax returns, in addition to any audits required by contract. Accordingly, staleness of a search warrant for business papers can never exist until the passage of the maximum period of years within which an audit of the affairs of the business is lawfully permissible, even though there has already been a full and complete audit.

The principles of *Sgro, supra*, will be effectively repudiated. No longer will the validity of a search warrant be based on a showing that the object of the search was in existence on the premises to be searched within a reasonable short period prior to the request for a search warrant.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

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STATE OF NORTH CAROLINA

v.

JEROME H. LOUCHHEIM, III

No. 50.

Supreme Court of North Carolina.

Jan. 4, 1979.

This Court granted defendant's petition for discretionary review of the decision of the Court of Appeals, 36 N.C.App. 271, 244 S.E.2d 195 (1978) (Clark, J., concurred in by Morris and Arnold, JJ.), which found no error in his conviction entered in the 10 June 1977 Session of Wake County Superior Court, Braswell, J., presiding.

On 25 May 1976, a search warrant was issued by a magistrate on the basis of the affidavit of Curtis L. Ellis, an S.B.I. agent. The affidavit submitted facts alleging probable cause to believe the defendant had obtained money by false pretense through submitting inflated bills and invoices to the State of North Carolina pursuant to an advertising contract. The affidavit also alleged there was probable cause to believe that the business offices of Louchheim, Eng & People, Inc. (formerly Capital Communications, Inc.) contained various documents constituting evidence of the crime. A search was conducted that same day, and various business records were seized.

On 28 June 1976 defendant was charged in nine separate indictments, proper in form, with conspiracy

to commit felonious false pretense and eight charges of feloniously obtaining property by false pretense.

The defendant then moved to quash the search warrant and suppress the use of all materials seized pursuant to it. On 15 July 1976 a pretrial hearing on the motion was held, and the judge denied it. The defendant made a motion to dismiss the indictments on the ground that venue was improper, which also was denied after a pretrail hearing.

At trial the evidence for the State tended to show the following:

On 1 June 1973 Capital Communications, Inc. (hereinafter referred to as CCI), a corporation of which defendant was president and principal stockholder, was let a State advertising contract for the period 1 July 1973 to 30 June 1974. At the time the contract was let to CCI, Julian Eng was represented as the senior vice president of the company, and he was listed as treasurer of CCI in its franchise tax return filed 12 December 1973. Annual advertising contracts were subsequently let to CCI on 1 July 1974 and 1 July 1975.

Under all three contracts, CCI was to be compensated at the rate of "15% of amount billed, or such fee as may be agreed upon in advance in writing, plus actual expenses incurred." For production work that may be purchased from outside sources, "the advertising agency shall be compensated for actual amounts paid by the agency or in accordance with the prevailing rates for this type of work, whichever is lower." CCI submitted bills to the State under the advertising contract, and State employees testified that the bills were approved and paid. The contracts also stipulated

that all invoices were subject to inspection and audit by the State.

In December of 1974 a state auditor, Donnie Wheeler, examined the State CCI account and determined that documentation of the invoices and bills received from that company was inadequate. An audit was conducted, and numerous instances of CCI either overcharging or undercharging the State were discovered. The auditors concluded that the advertising company owed the State approximately $14,000. This figure was later reduced to $10,907 and was paid by C.C.I.

A second audit began in February of 1976, and all of CCI's accounts were examined, not just the account relating to the State advertising contract. Ad Com International (hereinafter referred to as Ad Com) was a company based in Florida which did some production work for CCI in connection with the State contract and other unrelated contracts. The auditors discovered that the dollar amounts in all the invoices from Ad Com were different from the amounts stated in bills from CCI to the State for work done by Ad Com relating to the State contract. The defendant explained that the differences were due to a monthly service fee and other expenses that were credited back and forth between the two companies. When the auditors asked CCI personnel for various specific Ad Com invoices, it took anywhere from a matter of minutes to a full day to obtain one. In comparing the invoices with the corresponding bills from CCI to the State, both the descriptive language and the monetary amounts were identical.

The auditors asked the defendant to assist them in obtaining Ad Com's books. The address for CCI's

Florida office and that of Ad Com were the same. He stated that he had nothing to do with Ad Com and therefore could give them neither permission nor access to the company's books. He would, however, contact Mr. Julian Eng, the president of Ad Com, to see if he would grant them permission. Later the defendant informed the auditors that the books had been sent but he never received them.

Toni Brennan testified that when she was working for Ad Com in Florida in the summer of 1974, the defendant asked her to type Ad Com invoices dating from June 1973 from bills CCI had sent the State. The defendant told her "he needed a copy for the auditors because the real bills that were sent up on a monthly basis did not match what he had actually billed the State." Ms. Brennan testified that these bills were different from the corresponding Ad Com invoices she had previously typed; the dollar amounts had been raised. This employee then moved to Raleigh and began working for CCI in October of 1974. The defendant brought back blank Ad Com invoices after a trip to Florida, and she continued to type Ad Com invoices in this fashion from CCI bills sent to the State. The original Ad Com invoices were put in a file folder marked "real" and given to the defendant. The second set were placed in a file folder in the front office of CCI. Ms. Brennan also stated that she typed a few Ad Com invoices during the CCI audit when specific ones were requested.

Ms. Brennan testified she had heard the defendant and Mr. Eng talking about the State contract several times. "It was said that anytime you had a government account you have to milk it for all it's worth and that's when you make all the money you can while you've

got it." The two men discussed how they were going to "mark up the bill," and she saw Mr. Eng writing figures on Ad Com bills during phone conversations with the defendant.

Toni Brennan's job was terminated by the defendant on 31 May 1975. Thereafter she informed him that newspaper reporters had been to her office to get information about CCI and the State advertising contract. The defendant told her not to tell the reporters anything and that "they can't prove anything."

State's Exhibit Number 28, introduced into evidence at trial, was a file folder seized during the search of CCI. On the index tab was the heading "BILLS—Ad/Com Billing," and there was a black ink mark between the words "Ad/Com" and "Billing." A document examiner for the S.B.I. testified that the word "Special" had been crossed out.

Donnie Wheeler, a state auditor, took the stand and was qualified by the court as an expert in accounting and auditing. State's Exhibit Number 24 had previously been admitted into evidence and identified as a copy of one of the ledger sheets of Ad Com. State's Exhibit Number 41 had been admitted into evidence and was a compilation of invoices allegedly from Ad Com to CCI that Ms. Brennan testified she had typed from CCI bills to the State at defendant's request. The auditor compared corresponding invoice numbers in the two exhibits, and many of the figures were different.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit on all the indictments. The trial court granted the motion as to one

substantive count and denied it as to the conspiracy case and the remaining false pretense charges.

The evidence for the defendant tended to show the following:

Three former employees of CCI testified that in all the time they worked with the defendant, they were aware of no inflated billings to the State. They had never been asked to alter bills in any way. Two other witnesses vouched for the defendant's good reputation in the community.

The defendant took the stand in his own behalf. He stated that sometimes he received "working copies" of Ad Com invoices that were changed either in Florida by Mr. Eng or by him in North Carolina due to increased costs. He admitted that CCI's bookkeeping system was inefficient, partly because reimbursement by the State pursuant to the advertising contract was often erratic and overdue.

The defendant denied asking Toni Brennan or anyone else to type Ad Com invoices from bills that had been submitted to the State. He also denied ever having submitted false bills to the State or having stated that he was going to "milk" the State contract. The "Special" Ad Com file referred to Ad Com work that was unrelated to the State contract.

The defendant testified he had known Mr. Eng for twelve years when CCI obtained the State advertising contract. Mr. Eng was probably introduced at the time as the vice president of CCI, but he was never an officer of that company. In 1975 the defendant and Mr. Eng reorganized CCI and Ad Com into Louchheim, Eng & People, Inc. in order to turn "two un-

profitable companies in[to] one that would make some money."

At the close of all the evidence, the defendant renewed his motion as of nonsuit, which was denied. The jury returned verdicts of guilty in the conspiracy case and four of the substantive charges and not guilty in the other three false pretense charges. The Court of Appeals found no error in the trial, and this Court granted defendant's petition for discretionary review.

Other facts relevant to the decision will be included in the opinion below.

Atty. Gen. Rufus L. Edmisten by Associate Atty. Gen. R. W Newsom, III and Associate. Atty. Gen. J. Chris Prather, Raleigh, for the State.

Akins, Harrell, Mann & Pike by Bernard A. Harrell and Ragsdale, Liggett & Cheshire by Joseph B. Cheshire V and Peter M. Foley, Raleigh, for defendant.

COPELAND, Justice.

For the reasons stated below, we have determined that the defendant had a trial free from prejudicial error. His conviction is affirmed.

In his first assignment of error, the defendant contends the trial court erred in denying his motion to suppress the evidence seized pursuant to the search warrant. He claims the affidavit on which the warrant was based contained false information that was crucial for the probable cause determination. We do not agree.

In *Franks v. Delaware,* ——U.S. ——, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the United States Supreme Court squarely addressed this issue.

> "[W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *Id.* at ——, 98 S.Ct. at 2676-77, 57 L.Ed.2d at 672."

In this case there was a pretrial hearing on defendant's motion to suppress the evidence seized during the search. The defendant presented witnesses tending to show that some of the information in the affidavit of the S.B.I. agent was false. Thus, the requirement in *Franks* that a defendant have the opportunity to prove falsity has been met. *See also* G.S. 15A-978(a).

The affidavit in question contained an assertion that Judith Justice, a former employee of CCI, "confirmed the existence of two sets of incompatible and different invoices from Ad-Com International to CCI and Louchheim, Eng and People, Inc." At the motion hearing Mrs. Justice testified she had never said there were "incompatible" sets of invoices. Instead, she had told the agents there were two sets of invoices but that she did not know whether they were alike or different. The S.B.I. agent took the stand and essentially corroborated Mrs. Justice's testimony.

The court found that "the affidavit was truthful as defined in Section 15A-978(a) of the General Statutes in that it reported in good faith, although exaggerated, the circumstances relied upon to establish probable cause." We need not now decide whether the "good faith" test for truthfulness set forth in G.S. 15A-978(a) meets the standards in *Franks* or whether the court's determination of good faith in this case is supported by the evidence. Rather, we find that there was probable cause to support the search warrant on the face of the affidavit when this false information is disregarded.

The defendant attacks the magistrate's finding of probable cause in this case on the ground that there was no reason to believe the materials sought were located at that time in the place to be searched, the defendant's business offices. It is beyond dispute that probable cause must exist at the time the warrant issues. "[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States,* 287 U.S. 206, 210, S.Ct. 138, 140, 77 L.Ed. 260, 263 (1932.) Whether probable cause exists, however, is a determination based on practicalities, not technicalities, *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), and each case must be decided on its own facts. *Sgro v. United States, supra.*

The affidavit in question stated in part:

> "The confidential source of information disclosed that CCI maintained two different sets of invoices detailing the production costs purported to be incurred as a result of the State advertising con-

> tract. . . . The informant further related that records concerning the actual and true production costs incurred by Ad-Com International, Inc., were in the possession of Jerome M. Louchheim at the Raleigh offices of Louchheim, Eng and People, Inc. (Formerly CCI). . . . The informant further related based on personal knowledge and observation of the said records and invoices, that said records and invoices were never removed from the offices of Louchheim, Eng and People, Inc. and Jerome H. Louchheim, but were kept in those offices in compliance with the State advertising contract previously entered into with the State of North Carolina. The informant's last personal knowledge of and observation of said records and invoices was during the month of March of 1975, at which time the said records and invoices were located under lock in the Raleigh offices of Louchheim, Eng and People, Inc. and Jerome H. Louchheim."

Disregarding the allegedly false information, the affidavit also stated that Judith Justice confirms the existence of two sets of Ad Com invoices based on her own observation during her employment at CCI.

We find that the above information was sufficient to establish probable cause for the magistrate to issue the search warrant. Two people had seen different sets of invoices at defendant's offices. Although it was fourteen months since either one had personally observed the invoices, that fact is not conclusive.

> "The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the

> crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc." *Andresen v. Maryland,* 24 Md. App. 128, 172, 331 A.2d 78, 106 (1975), *cert. denied,* 274 Md. 725 (1975), aff'd, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). *See also United States v. Steeves,* 525 F.2d 33 (8th Cir. 1975).

In this case, the alleged crime is a complex one taking place over a number of years. The place to be searched is an ongoing business. The affidavit further alleged that the invoices "were never removed from [defendant's] offices . . . but were kept in those offices in compliance with the State advertising contract."

Most important, the items to be seized included "corporate minutes, bank statements and checks, sales invoices and journals, ledgers, correspondence, contracts, . . . and other books and documents kept in the course of business by Louchheim, Eng and People and Capital Communications, Incorporated, of N.C. during all periods which said corporations were under contract to perform any advertising services [for] the State of North Carolina." Thus, the supposedly incompatible invoices that had been seen fourteen months earlier were not the only items to be seized during the search. All these materials could constitute evidence of defendant's alleged crime of obtaining property from the State by false pretense pursuant to the advertising contract.

We think there was a "substantial basis" for the magistrate to conclude that these business records

were "probably" located at defendant's business offices on 25 May 1976 when the search warrant issued. "No more is required." *Rugendorf v. United States,* 376 U.S. 528, 533, 84 S.Ct. 825, 828, 11 L.Ed.2d 887, 891 (1964). *See also Andresen v. Maryland,* 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Moreover, reviewing courts are to pay deference to judicial determinations of probable cause, *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca, supra* at 109, 85 S.Ct. at 746, 13 L.Ed.2d at 689. This assignment of error is overruled.

The defendant claims the court improperly denied his motion to dismiss the indictments on the ground that venue was improper.

It is clear that when a defendant makes a motion to dismiss for improper venue in North Carolina, the burden is on the State to prove by a preponderance of the evidence that the offense occurred in the county named in the indictment. *State v. Batdorf,* 293 N.C. 486, 238 S.E.2d 497 (1977). In this case the indictment specified that venue lay in Wake County.

At the pretrial hearing on defendant's motion, the State introduced testimony that the defendant came to North Carolina when he received the State advertising contract. His place of business, CCI, was located in Raleigh, North Carolina, and vouchers were issued by the State to his Raleigh office pursuant to the contract. In addition, bills or invoices were submitted by the defendant on behalf of CCI to the North Carolina Department of Natural and Economic Resources,

which we note is also located in Raleigh. The defendant offered no evidence. Thus, the State proved by a preponderance of the evidence that if the substantive charges of obtaining property by false pretense were committed, they occurred in Wake County.

"It is generally held that the venue in an indictment for conspiracy may be laid in the county where the agreement was entered into, or in any county in which an overt act was done by any of the conspirators in furtherance of their common design." *State v. Davis,* 203 N.C. 13, 25, 164 S.E. 737, 744 (1932), *cert. denied,* 287 U.S. 649, 53 S.Ct. 95, 77 L.Ed. 561 (1932). Again, the evidence recounted above is sufficient to prove that overt acts pursuant to the conspiracy were performed in Wake County; to wit: submission of allegedly false bills to the State from defendant's Raleigh business and receipt of the State vouchers by that office.

The defendant argues that at the motion hearing the State had the burden of proving a crime actually occurred in addition to proving where it allegedly took place. This contention is without merit. The issue of whether there is reason to believe a crime was committed is properly raised at the probable cause hearing and at trial, not at a pretrial hearing on a motion to dismiss for improper venue. At the motion hearing, the State has to prove merely that *if* a crime took place, it occurred in the county indicated in the indictment.

The State introduced the affidavit of Charles Randell Lassiter III over defendant's objection at the pretrial hearing. The defendant claims that this action constituted error in that the affidavit was inadmissible

hearsay and violated defendant's Sixth Amendment right to confront the witnesses against him.

We need not decide whether the admission of that document was improper. As shown above, the oral testimony properly admitted at the hearing was sufficient to show that the alleged crimes were committed in Wake County. Therefore, the admission of the affidavit, if error, was nonprejudicial beyond a reasonable doubt. This assignment of error is overruled.

Defendant next assigns as error the fact that Donnie Wheeler testified before the jury regarding CCI's total overbillings to the State and used State's Exhibit Number 45 to illustrate his testimony. The defendant argues that this evidence was incompetent and inadmissible because it was based on the auditor's unfounded assumptions and on evidence not admitted at trial.

Before Mr. Wheeler testified, a *voir dire* was conducted, and he was found to be an expert in accounting and auditing. The trial court stated that his testimony was necessary for the understanding of both the court and the jury because of the complexity of the case.

Mr. Wheeler compared dollar amounts in certain invoices CCI sent the State for Ad Com work with corresponding invoice entries in State's Exhibit Number 24, a copy of a sheet in Ad Com's ledger. He pointed out specific discrepancies in the figures. Defendant raises no objection to that testimony to this Court.

The State auditor was then going to use State's Exhibit Number 45 to illustrate his testimony regarding the aggregate amount of CCI's overbilling to the State. That exhibit was a three-page chart prepared

by Mr. Wheeler purporting to compare the total amount CCI billed the State for Ad Com work with the total amount CCI paid Ad Com for production work pursuant to the State contract. Another *voir dire* examination was conducted, and the court ruled that the testimony and use of the exhibit would be allowed.

In preparing State's Exhibit Number 45, Mr. Wheeler added all the checks from the State to CCI, which had been admitted into evidence at trial. He then added all the Ad Com invoices that were sent to CCI, which also had been introduced into evidence. The defendant had told Mr. Wheeler during the second audit of CCI that some of the Ad Com invoices included work done for CCI that was unrelated to the State contract. The auditor subtracted those amounts he concluded were unconnected to work done for North Carolina. Mr. Wheeler also deducted an amount totalling the monthly service charges between Ad Com and CCI for the period in question because the defendant had stated "that the $1,500 was a 5% agency service fee payable to Ad Com that was not in the bill to the State." The auditor also subtracted postage because he determined that it was not part of production costs. Defendant's objection is partly based on the fact that the auditor made these deductions. This argument is without merit.

An auditor is defined as "[a]n officer who examines accounts and verifies the accuracy of the statements therein;" an audit is "[a]n official examination of an account or claim, comparing vouchers, charges, and fixing the balance." BLACK'S LAW DICTIONARY 166-67 (Rev. 4th ed. 1968). An expert conducting an audit must regularly make the very types of conclu-

sions of which defendant now complains. Determining whether a particular charge falls within a specific account is certainly within an auditor's area of expertise.

Apparently the defendant claims that because Mr. Wheeler did not actually *know* whether certain Ad Com charges were unrelated to the State contract or whether postage was not properly included in production costs, his testimony was incompetent. On the contrary, these determinations logically stemmed from Mr. Wheeler's expertise and experience in auditing and accounting and from his own personal examinations of the documents. If some of his deductions were erroneous, the defendant had the opportunity to and actually did bring this fact to the attention of the jury during cross examination of Mr. Wheeler and during direct examination of his own witnesses.

Before Mr. Wheeler testified to these matters, the trial judge properly instructed the jury that State's Exhibit Number 45 was not direct evidence. He stated that it is "received solely for the limited purpose of illustrating and explaining the testimony of the witness and it is for you alone to say whether it does so." Furthermore, although the jury asked for and was given the exhibits to consult during its deliberation, with the consent of the State and defendant, State's Exhibit Number 45 was not included among them.

Defendant claims that the chart was overly prejudicial in that it "invited the jurors to disregard the assumptions made by the witness and concentrate on the bottom line figure." This assertion is belied by the fact that the jurors, instead of blindly accepting the total amount stated in the exhibit, returned verdicts of

guilty in four of the substantive charges and not guilty in three of them.

The defendant further objects that Mr. Wheeler based at least part of his testimony and State's Exhibit Number 45 on hearsay. This claim is controverted by the record.

It is well settled that an expert can base his opinion on his own personal knowledge and observations, *or* on evidence introduced at trial presented to the expert through a hypothetical question, or both. *See, e.g., State v. Holton,* 284 N.C. 391, 200 S.E.2d 612 (1973). Mr. Wheeler admitted using several documents not in evidence to reach his conclusion as to CCI's total overbillings. The record indicates, however, that these materials were personally viewed and considered by him in his expert capacity. He testified to their existence and where he got them, to what they contained, and to how they were used in preparing State's Exhibit Number 45. "Since it is the jury's province to find the facts, the data upon which an expert witness bases his opinion must be presented to the jury in accordance with established rules of evidence." *Todd v. Watts,* 269 N.C. 417, 420, 152 S.E.2d 448, 451 (1967). Mr. Wheeler's oral testimony was sufficient in this respect. This assignment of error is overruled.

The defendant next contends the trial court erred in denying his motion as of nonsuit as to all the crimes with which he was charged. We do not agree.

In ruling on a motion as of nonsuit, it is beyond dispute that the evidence is to be considered in the light most favorable to the State, and the State is allowed every reasonable inference therefrom. *State v. Bell,* 285 N.C. 746, 208 S.E.2d 506 (1974).

> "A motion for nonsuit of a charge of obtaining property by false pretense must be denied if there is evidence which, if believed, would establish or from which the jury could reasonably infer that the defendant (1) obtained value from another without compensation, (2) by a false representation . . ., (3) which was calculated and intended to deceive and (4) did in fact deceive." *State v. Agnew*, 294 N.C. 382, 387-88, 241 S.E.2d 684, 688 (1978), *cert. denied*, —— U.S. ——, 99 S.Ct. 107, 58 L.Ed.2d 124 (1978).

The defendant claims the State failed to meet its burden of proving in both the conspiracy charge and in the substantive ones that there was a *false* representation. He argues there was no competent evidence introduced at trial that the bills CCI submitted to the State did not represent true production costs. This argument is without merit.

Under the State advertising contract, CCI was to be paid for production work purchased from outside sources "for actual amounts paid by the agency or in accordance with the prevailing rate for this type of work, whichever is lower." State's Exhibit Number 24 was admitted into evidence and identified by Toni Brennan as a copy of one of Ad Com's ledger sheets. She testified that in preparing the first set or "true" Ad Com invoices, she would assemble the invoices from other companies and give the compilation to Mr. Eng. He would then make up a bill, and she would type the invoice and enter the invoice number and amount in Ad Com's ledger. Thus, although the entries in State's Exhibit Number 24 cannot be used to show the true costs to the third party producers who actually performed the work, they can be used to show the amount

CCI had to pay Ad Com for that work. Thise figures were different from the corresponding amounts CCI billed North Carolina. Therefore, there was sufficient evidence from which a jury could reasonably infer that false representations were made.

The defendant claims the State did not show that the defendant personally committed any crime because the allegedly false representations were made by CCI in its corporate capacity. This contention likewise is without merit.

The indictments charged and the trial judge properly instructed the jury that CCI was alleged to be the *alter ego* of the defendant. The evidence at trial showed that the defendant owned seventy-five percent of the stock of CCI; the other twenty-five percent was held in a blind trust for Stephen Crouch. The defendant was at all times the president and managing officer of the advertising company. There was testimony that the defendant was the person who ordered the inflated Ad Com invoices typed from State bills, and he and Mr. Eng decided to "milk" the State contract. The record is replete with evidence that CCI was run according to defendant's wishes.

> "[W]hen, as here, the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person." *Henderson v. Security Mortgage and Finance Co.*, 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). *See also State v. Salisbury Ice and Fuel Co.*, 166 N.C. 366, 81 S.E. 737 (1914).

This assignment of error is overruled.

For the foregoing reasons, the defendant had a trial free from prejudicial error. The decision of the Court of Appeals is AFFIRMED.

BRITT and BROCK, JJ., did not participate in the consideration or decision of this case.

36 N.C.App. 271

STATE OF NORTH CAROLINA

v.

JEROME H. LOUCHHEIM, III.

No. 7710SC909.

Court of Appeals of North Carolina.

May 16, 1978.

Defendant pled not guilty to indictments as follows: (1) 76CR29772, charging conspiracy with Harry Julian Eng and others during the period from 1 June 1973 to 28 June 1975 to commit felonious false pretense by submitting false billings to the State; (2) 76CR-29773, charging false pretense on 22 August 1973 by falsely representing to the State advertising production costs in the sum of $38,254.98, which was $374.78 more than actual costs; (3) 76CR29774, charging false pretense on 10 October 1973 by falsely representing to the State advertising production costs in the sum of $11,198.68, which was $628.12 more than actual costs; (4) 76CR29775, charging false pretense on 4 December 1973 by falsely representing to the State advertising production costs in the sum of $24,972.94, which was $239.00 more than actual costs, and (5) 76CR29776, charging false pretense on 11 January 1974 by falsely representing to the State advertising production costs in the sum of $23,410.45, which was $370.00 more than actual costs.

The evidence for the State tended to show that in 1970 defendant opened an advertising agency in Flor-

ida. In 1971 he came to North Carolina and worked as a consultant in the gubernatorial campaign of James E. Holshouser. After Holshouser's election, defendant, in 1972, formed Capital Communications, Inc. (hereafter C.C.I.) in anticipation of doing advertising business in this State. In May 1973 he was informed that he had the State advertising contract. Under the contract in general defendant received a commission of 15% on all advertising production work. He associated Julian Eng, a commercial artist with his own agency in Florida, to do production work on the North Carolina contract when needed. They had known each other for several years. Defendant agreed to pay Eng an "agency fee" of $1,500 per month.

Defendant signed three ad contracts with the State, each for one year, beginning 1 July 1973, the first two for C.C.I. In April 1975 defendant and Eng reorganized their agencies into Louchheim, Eng & People, Inc., and the third contract was awarded to this corporation. The contract was for State advertising costing about $400,000 to $500,000 annually. Defendant's agency was to be compensated for actual sums paid to others for production work or the prevailing rates for this type of work, whichever is lower, plus his commission.

A State audit in March 1975 revealed overbillings amounting to about $10,970 for the period from 1 July 1973 to 31 December 1974. This sum was paid by C.C.I. A second audit in February 1976 revealed overbilling of $2,916, which was paid by C.C.I. The State Auditor found the books and records of C.C.I. to be disorganized.

State's witness Toni Brennan, who worked for Mr. Eng in Florida, testified that in early 1974 defendant

handed her some invoices in Eng's office and asked her to type up bills from Eng to match the C.C.I. bills to the State so that he would have them if the auditors came over. In October 1974 she left Eng and came to work for defendant in Raleigh, where she continued to type Eng's invoices as directed by defendant, who told her he was upping the bills so that he could make some money and make up for Mr. Eng's agency fee of $1,500 a month. She heard defendant and Eng state that any time you had a government contract you had to milk it for all it's worth. She heard them talk about marking up the bills. She placed the inflated invoices in a file folder in the front office; the original "true billings" from Eng to defendant she placed in a file folded entitled "Real" and gave it to defendant.

On 25 May 1976, a search warrant was issued for search of the offices of C.C.I. and Louchheim, Eng & People, Inc. for books, checks, and other records of these corporations relating to the State advertising contract. The search warrant was based on the application and affidavit of Curtis L. Ellis, S.B.I. Agent, averring that he was informed by a reliable confidential informant that defendant kept two different sets of invoices, one set with inflated and inaccurate production costs that were submitted to the State for payment; that after the false and inflated invoices were submitted to the State, defendant prepared a separate set of invoices prepared on Eng's letterheads reflecting the false and inflated production costs.

A search was made and records seized on 25 May 1976.

Defendant moved to quash the search warrant and suppress the evidence. The hearing on this motion was

held on 15 July 1976. After hearing evidence offered by defendant and the State, the court found that the search warrant was validly issued, and that the search and seizure was reasonable in scope and did not violate the Fourth Amendment. The motion to suppress was denied.

Donnie W. Wheeler, a Supervisor in the office of the State Auditor, examined the books and records seized from defendant's office pursuant to the search warrant. He testified that he found records revealing that actual advertising production costs, evidenced by Eng agency bills to defendant paid by checks, had been increased by defendant submitting invoices to the State for payment as charged in the indictments.

Defendant offered the testimony of several employees, including his wife, who was a bookkeeper for C.C.I., which tended to show that defendant operated an efficient advertising agency, that he was honest and had a good reputation.

Defendant's testimony tended to show that in the early 1960's he began public relations and advertising work in Florida, subsequently joined the campaign staff of a gubernatorial candidate, was appointed Commissioner of Hotels and Restaurants of Florida in 1968, and opened his own advertising agency in 1970. In 1971 he spent three or four days in North Carolina working as a consultant in the Holshouser campaign. In 1972 he formed C.C.I. in this State in anticipation of doing advertising business here. He was awarded the State advertising contract in May, 1973. He had known Julian Eng for 12 years. Eng was a commercial artist and had the State of Florida advertising account. Defendant agreed to pay Eng 5% of the gross

for production work. Eng was paid $1,500 monthly, and an adjustment was made at the end of the year.

Eng submitted a bill once a month for production work; defendant would then bill the State. Some of the invoices relied on by the State were "working copies" which were subsequently increased when he or Eng received new information from suppliers. He never told Toni Brennan he was going to "up" the bills to the State, and he never asked her to type up a whole set of invoices for the State auditors. He submitted no false invoices to the State, but there were some errors in billings.

The jury returned verdicts of guilty as charged. From judgment imposing an active prison term of four years and judgment of five years in prison suspended for five years upon good behavior and restitution payments of $1,611.90 to the State, defendant appeals.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. Charles M. Hensey and Associate Attys. John C. Prather and Robert W. Newsom, III, Raleigh, for the State.

Akins, Harrell, Mann & Pike by Bernard A. Harrell, Ragsdale, Liggett & Cheshire by Joseph B. Cheshire, V, and Peter M. Foley, Raleigh, for defendant-appellant.

CLARK, Judge.

The defendant brings forward in his brief, consisting of 76 pages, eight assignments of error in seven arguments. Their voluminosity demands that we treat each of them albeit briefly.

First, defendant contends the trial court erred in denying his motion to suppress the evidence seized pursuant to an invalid search warrant because the supporting affidavit of Curtis Ellis (a) fails to show that the confidential informant was reliable as to the information, (b) fails to show probable cause in that the information of the informant was 14 months old, (c) is defective in that the information allegedly obtained from Judith Justice was inaccurate and false, and (d) is defective in that the search warrant did not specify the items to be seized.

In *State v. Harris,* 25 N.C.App. 404, 213 S.E.2d 414, *app. dis.* 287 N.C. 666, 216 S.E.2d 909 (1975), and *State v. Brannon,* 25 N.C.App. 635, 214 S.E.2d 213, *cert. den.* 287 N.C. 665, 216 S.E.2d 908 (1975), this Court imposed a limitation on the possible scope of challenging the search warrant's validity by attacking the affidavit upon which its issuance was based. In these cases the court decided that when the search warrant is valid on its face and the sworn allegations are sufficient to establish probable cause, a defendant may not attack the validity of the allegations or the credibility of the affiant or his informant in the *voir dire* hearing on the defendant's motion to suppress the evidence seized by law enforcement officers. The United States Supreme Court has never ruled directly on this issue, although it is arguable that such attack in the *voir dire* is consistent with the policy of *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), which made the exclusionary rule a requirement of the Fourth Amendment. We note, however, that some members of the Supreme Court are backing off from the exclusionary rule as set out in *Mapp.* See Chief Justice Burger's dissent in *Bivins v. Six Un-*

known Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and Justice Harlan's dissent in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, *reh. den.* 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 120 (1971). And the Burger court has refused to extend the rule to any situation. See *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed. 2d 561 (1973), holding that the exclusionary rule does not apply to evidence introduced before grand juries; *Rugendorf v. United States,* 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887, *reh. den.* 377 U.S. 940, 84 S.Ct. 1330, 12 L.Ed.2d 303 (1964), holding that errors did not invalidate the search warrant because they were not material to the finding of probable cause; *United States v. Janis,* 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976), holding that evidence illegally seized by state officers may be used in a federal civil proceeding; *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976), holding that a state prisoner may not be granted habeas corpus relief in federal courts upon the ground that evidence obtained in an unconstitutional search was introduced at his trial, if he had an opportunity for a full and fair litigation of the Fourth Amendment claim; and *United States v. Ceccolini,* —— U.S. ——, 98 S.Ct. 1054, 55 L.Ed.2d 268 (21 March 1978), which qualified the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), by holding admissible the voluntary testimony of an eyewitness (respondent's employee) concerning the ownership of certain policy slips, which testimony resulted from the discovery by a police officer of the betting slips during an illegal search of respondent's flower shop.

We find that the search warrant is valid on its face, that the affidavit of Curtis Ellis, S.B.I. Agent, contained facts and circumstances within his knowledge, and of which he had reasonably trustworthy information, and presented sufficient justification for probable cause for issuance of the search warrant. *Berger v. New York,* 388 U.S. 41, 87 S.Ct. 1973, 18 L.Ed.2d 1040 (1967). We decline to consider the attack upon the credibility of the confidential informant referred to in the Ellis affidavit or the credibility of the information obtained by Judith G. Justice in view of the rule adopted in this court by ths *Harris* and *Brannon* cases, *supra.*

The defendant contends that a lapse of some 14 months since the informant had seen the business records of the defendant was such a lapse of time that there could be no probable cause to believe that the records sought were present in the place to be searched. The defendant relies on *State v. Campbell,* 14 N.C.App. 493, 188 S.E.2d 560 (1972), cases collected in 100 A.L.R.2d 525, and various decisions of the Federal Courts of Appeal. In *Campbell* the item sought in the search was a narcotic drug. In the other cases relied on, the items sought were likely to be consumed, sold or otherwise removed within a relatively short period. In the case *sub judice,* the items sought in the search warrant were business records, records that were required to be kept in compliance with the State advertising contract. Such records are usually kept for years, and the office in which they were kept by the defendant 14 months ago was still in the possession of the defendant. There were reasonable grounds to believe that he retained the records in his office. In *Andresen v. Maryland,* 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d

627 (1976), the items sought were business records, and the court held that a lapse of three months was reasonable and supported the finding of probable cause.

Nor do we find merit in defendant's claim that the search warrant did not specify in sufficient detail the items sought. The search warrant referred to the property described in the application. Such incorporation by reference was approved in *State v. Flowers,* 12 N.C. App. 487, 183 S.E.2d 820, *cert. den.* 279 N.C. 728, 184 S.E.2d 885 (1971). The items described in the application were "corporate minutes, bank state....s [statements] and checks, sales invoices and journals, ledgers, correspondence, contracts, ...ices, [invoices] and other books and documents kept in the course of business by Louchheim, . . ." The State was seeking evidence of fraudulent overcharges by defendant in invoices to the State under the advertising contract. The investigation involved a complex *modus operandi* involving business records other than the invoices submitted by defendant to the State. The list of documents in the search warrant included only the records relating to the State advertising contract. We find the items to be seized were sufficiently designated in the warrant. And we find, further, that the circumstances required that the officers executing the search warrant inspect certain innocuous records and documents in order to locate and seize the ones which tended to show the suspected criminal activity. In *Andresen v. Maryland, supra,* the court recognized that investigators conducting the search will exercise some judgment and "discretion" in separating the innocuous from the incriminating. The scope of the search and seizure was reasonably limited in the search warrant and did not violate G.S. 15A-253.

We conclude that the trial court properly denied the defendant's motion to quash the evidence seized under the search warrant.

In the hearing on defendant's motion to dismiss for improper venue, the trial court, over defendant's objection, received in evidence and considered the affidavit of Charles R. Lassiter, III. The defendant contends that the court erred because the affidavit (1) was hearsay and (2) violated his right of confrontation.

Upon a motion to dismiss for improper venue the State has the burden to go forward and produce evidence to show venue properly lies in the county of indictment. *State v. Miller,* 288 N.C. 582, 220 S.E.2d 326 (1975).

The use of affidavits in determining preliminary and interlocutory motions are considered proper, irrespective of the vital influence the decision may have upon the outcome of the action. *In re Custody of Griffi,* 6 N.C.App. 375, 170 S.E.2d 84 (1969); 3 Am.Jur.2d, Affidavits, § 28, pp. 403-404. We note that defendant did not request the right to subpoena the affiant and confront him by cross-examination.

The right of confrontation under the Sixth Amendment is applicable only to the trial for an offense charged and not for hearing or inquiries incidental to the trial. 21 Am.Jur.2d Criminal Law, § 337, pp. 364-365.

We find no merit in this assignment of error.

Nor do we find merit in defendant's contention that the State failed in its burden of proving that Wake County was the proper venue. The State had the burden of showing that the offenses charged, or any act or

omission constituting part of the offense, occurred in Wake County. *State v. Miller, supra; State v. Jarrette,* 284 N.C. 625, 202 S.E.2d 721 (1974). Where conspiracy is charged, the proper venue is the county where the conspiracy was entered into or in which any overt act was committed by any of the conspirators in furtherance of the common design. *State v. Goldberg,* 261 N.C. 181, 134 S.E.2d 334 (1964); *State v. Hicks,* 233 N.C. 511, 64 S.E.2d 871 (1951).

The evidence at the venue hearing established that the State made payment under the advertising contract to defendant at his office in Raleigh, that defendant prepared and submitted invoices to the State, that defendant admitted that his place of business for purposes of the State contract was in Raleigh, and that defendant and Eng worked together in Raleigh on the State contract.

The question of venue is not an issue after the jury has been empaneled. *State v. Dozier,* 277 N.C. 615, 178 S.E.2d 412 (1971); *State v. Puryear,* 30 N.C.App. 719, 228 S.E.2d 536, *app. dis.* 291 N.C. 325, 230 S.E.2d 678 (1976). But it was not incumbent upon the State at the venue hearing to produce evidence of the crime itself; it had the burden of showing that *if* a crime was committed, venue properly lay in Wake County. We find that the State carried its burden and the evidence fully supported the denial of defendant's venue motion.

Defendant assigns as error the admission of the testimony of Toni Brennan, a witness for the State, about a discussion in her presence between defendant and Eng in which it was said "that any time you had a government account you have to milk it for all it's

worth and that's when you make all the money you can while you've got it. . . . I heard them discuss on more than one occasion how much more they were to mark it up when they sent it to the State." Too, Ms. Brennan testified that while working for Eng in Miami she would get on a telephone during conversation between defendant and Eng about "how they were going to mark up the bill after Mr. Eng had already made his bill."

The record on appeal reveals that before the foregoing testimony was admitted a *voir dire* examination of the witness was conducted, and the witness was cross-examined by defendant. The record does not include any part of the examination or findings and conclusions of the trial court. However, it does appear elsewhere in the record that Ms. Brennan began working for Eng in Miami in June 1973, that defendant came to the Eng office there in the summer of 1974 and had her type some "inflated" bills from Eng to C.C.I. to match the bills the defendant had actually billed the State. These bills were more than the "true billings" previously submitted by Eng to defendant. She testified also that some of Eng's bills to defendant also had inflated costs. The record on appeal does not disclose the time of the challenged conference on telephone conversations.

It is an established rule of law in North Carolina, in a majority of the other states, and in the Federal Courts, that the declarations and acts of any one of the co-conspirators made or done while the conspiracy is in existence, and in furtherance of the common design, are admissible against the other conspirators. *U. S. v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct.

210, 27 L.Ed.2d 213 (1970); *State v. Conrad,* 275 N.C. 342, 168 S.E.2d 39 (1969); *State v. Sanders,* 276 N.C. 598, 174 S.E.2d 487 (1970); *State v. Puryear, supra.*

But defendant contends that at the time the statements were made a conspiracy was not in existence, and that the statements were not in furtherance of any conspiracy but merely descriptive of a conspiracy.

The defendant relies on *Dutton v. Evans, supra,* to support his Sixth Amendment right of confrontation argument. In *Dutton,* the defendant Evans was tried in a Georgia state court for the murder of three police officers. A cell mate of one of his codefendants testified that when the codefendant returned from his arraignment, he stated, " . . . if it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." The statement was admitted under the Georgia co-conspirator exception to the hearsay rule. The United States Supreme Court in substance stated that the right to confrontation was violated by the introduction of a co-conspirator's hearsay statements, but found the statement was neither "crucial" to the prosecution nor "devastating" to defendant. The court did not find reversible error because there were many witnesses for the prosecution, including an eyewitness to the crime, who were subjected to full and effective cross-examination, and the questioned statement was "of peripheral significance at most."

The defendant refers to several federal cases for support of his claim that defendant was denied the right to confront Eng, and that Eng's availability as a defense witness was not material.

Neither *Dutton* nor the other federal cases relied on by defendant support his position in the case *sub*

judice for several reasons. First, it appears that the challenged statements were made subsequent to the conspiracy agreement. There is no direct evidence of this agreement, but the only reasonable inference from the circumstantial evidence is that the agreement was made by the time of the effective date of the State advertising contract on 1 July 1973. The statements were, as defendant argues, descriptive of a conspiracy, but they were descriptive of an existing conspiracy. Too, it does not appear from Ms. Brennan's testimony about the conference and telephone conversation who said what, but it is clear that each agreed with the other, which constituted an admission by the defendant. Any declaration by the defendant amounting to an admission on his part is admissible against him, although not made in furtherance of the conspiracy. *State v. Turner,* 119 N.C. 841, 25 S.E. 810 (1896), 39 N.C.L.R. 422 (1961).

Further, if it is conceded that some part of the challenged statements was made by Eng and was descriptive of the conspiracy, it was made also in furtherance of it, and therefore within the established rule of law which recognizes the admissibility of the declaration of a co-conspirator made while the conspiracy is in existence and in furtherance of the common design.

The defendant assigns as error (1) the finding by the court that the witness Donnie Wheeler, employee of the Office of the State Auditor, was an expert in the field of accounting and auditing, (2) allowing him to compare figures on various exhibits, and (3) permitting him to use and explain State's Exhibit 45, a comparison of the amounts billed by Eng to defendant with the amounts defendant billed to and paid by the State.

The trial court found that in light of the complex nature of the case with many records, figures and dates, the assistance of an expert would be valuable to the jury in understanding the evidence. After *voir dire,* the court found Wheeler to be an expert in the field of accounting. The finding was fully supported by the evidence. When material to the inquiry, an expert witness in the field of accounting may testify as to entries made in the books of a business and their meaning. *Bank v. Crowder,* 194 N.C. 331, 139 S.E. 604 (1927); *State v. Hightower,* 187 N.C. 300, 121 S.E. 616 (1924).

As an expert accountant, Wheeler's testimony in comparing figures on various exhibits and in showing and explaining the comparison figures was admissible. An expert accountant may give an opinion or conclusion if it is properly based on his personal examination of the records. *State v. Hightower, supra.* In *Teer Co. v. Dickerson, Inc.,* 257 N.C. 522, 126 S.E.2d 500 (1962), Justice Sharp (now Chief Justice), for the Court wrote:

> "Entries in the books of the defendant were clearly admissible against it as admissions. Stansbury on Evidence, Section 156. It was permissible for the auditor, an expert accountant, to interpret the books and testify what the books showed; he did not purport to say what amount was, in fact, due. Whether the books were correct or not, in the absence of a stipulation, was, of course, for the jury. In *La Vecchia v. Land Bank,* 218 N.C. 35, 41, 9 S.E.2d 489, an expert accountant, after examining the books of a corporation, testified that they did not indicate that the corporation was indebted to its president in any amount. The court said: 'The witness being an expert account-

> ant, his testimony, based upon personal examination of the books and records of the corporation, is clearly competent.' " 257 N.C. at 529, 126 S.E. 2d at 505.

The trial court did not err in finding Wheeler to be an expert in the field of accounting or in admitting his opinion testimony. These assignments of error are without merit.

Finally, defendant's motions for nonsuit were properly overruled. The State offered evidence that there was a conspiracy between Eng and defendant to submit false billings to the State, and that the bills submitted by defendant to the State were inflated and false as charged. The evidence supports the charges and was sufficient to overcome the nonsuit motion. Nor is it a defense that the false representations were made by Capital Communications, Inc., and not the defendant. He was president of the corporation and its agent. 3 Strong's, N.C. Index 3d, Corporations, § 8, pp. 485-486. Where the agent of a corporation in the course of his and his employer's business obtains anything of value for the corporation by false pretense both the corporation and the agent may be convicted. *State v. Ice Co.*, 166 N.C. 366, 81 S.E. 737 (1914).

We conclude that the defendant had a fair trial free from prejudicial error.

No error.

MORRIS and ARNOLD, JJ., concur.